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IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA

October Term, 1969

NO. 482

MARYLAND NATIONAL INSURANCE COMPANY, A CORPORATION, AND CARL BROOKS,

Appellants,

VERSUS

THE SEVENTH JUDICIAL DISTRICT COURT OF OKLAHOMA COUNTY, STATE OF OKLAHOMA, AND ALL OF THE JUDGES THEREOF,

Appellees.

Appeal from the Supreme Court of the State of Oklahoma

JURISDICTIONAL STATEMENT

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August, 1969

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Appeal from the Supreme Court of the State of Oklahoma

JURISDICTIONAL STATEMENT

Appellants appeal from the final order and judgment of the Supreme Court of the State of Oklahoma entered on July 1, 1969, denying appellants' Petition for Rehearing and its judgment entered on April 15, 1969 denying appellants' Petition for a Writ of Prohibition and vacating the temporary restraining order previously entered by said Court staying the execution and enforcement of the provisions of the Bail Bond

Act passed by the 1965 Legislature of the State of Oklahoma codified as 59 O.S. 1968 Supp., Secs. 1301-1340, pertaining to recovery by the State against sureties and bail bondsmen on forfeited criminal appearance bonds. The judgment of the Supreme Court of the State of Oklahoma held the legislative act to be constitutional as against appellants' attack that the said act violated the provisions of the Federal Constitution on the grounds that it denied appellants the right of a trial by jury, due process and equal protection of the law and was violative of the Federal Constitution against legislative encroachment upon judicial functions of the government.

Appellants submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial federal questions are presented.

OPINIONS BELOW:

The opinion and judgment of the Supreme Court of the State of Oklahoma was rendered on April 15, 1969 in causes numbers 43,342 and 43,437 pending in said Court, which causes were consolidated for disposition by order of the State Supreme Court which opinion appears at 455 P.2d 690 and also appears in the Oklahoma Bar Journal on April 19, 1969 at Page 924 and it appears in Appendix B pp. 17A to 24A.

Notice of appeal to the United States Supreme Court was filed with the Clerk of the Supreme Court of Oklahoma on August 4, 1969 and request for the Clerk of the Supreme Court of Oklahoma to certify the record to the United States Su-

preme Court was filed on August 5, 1969. This jurisdictional statement has been printed and 40 copies thereof has been filed with the Clerk of the United States Supreme Court to be considered along with the certified record now on file with the Clerk of this Court.

JURISDICTION:

The jurisdiction of this Court is invoked pursuant to 28 U.S.C., Sec. 1257(2).

The grounds on which the jurisdiction of this Court is invoked are:

The validity of the 1965 Bail Bond Act particularly Secs. 30, 32 and 33 thereof (Title 59 O.S., Secs. 1330, 1332, & 1333). Section 30 provides that if a breach occurs in the undertaking the Court shall declare the bond forfeited and the proceeds thereof paid into the Clerk of the Court. In case of a surety bondsman or professional bondsman the Court shall direct a copy of said judgment and forfeiture to the Commissioner (Insurance Commissioner of Oklahoma) who shall give notice by mailing a copy of the order and judgment to the surety bondsman and his insurer and the professional bondsman directing them to make a deposit to the Commissioner of cash or other valuable security in the face amount of the forfeiture; and if said deposit is not made to the Commissioner within thirty (30) days from the date of the judgment, the Commissioner shall in the case of a surety bondsman immediate-

ly cancel the license privilege to do business in the State of Oklahoma and cancel the license of all insurers, surety bondsman agents or runners who are licensed by this act. In case of professional bondsman, withdraw the fact amount of said forfeiture from the original deposit to be held in a separate escrow account pending appeal and final judgment upon said forfeiture. The Commissioner shall then direct the professional bondsman to make additional deposits to bring the original deposit to the required level; and should such additional deposit be not made within ten (10) days from receipt of notice, the license shall be revoked. The bondsman posting a property bond is not required to deposit cash on forfeiture. This section further provides that the bail bondsman or the insurer shall be given written notice of the date of the trial or other hearing of the defendant. Under this section the Oklahoma courts at the time they ordered the bond forfeited for non-appearance of the defendant also entered a monetary judgment against the sureties who signed the various bonds in question for the face amount of the bond. This was done at a time when the sureties were not parties to the action and without any notice to them that a money judgment was going to be taken against them, thus depriving them of a right to a trial by jury and of due process.

Section 32 of the act provides that after the judgment of forfeiture and the entry of a money judgment against the bondsman, the Clerk of the Trial Court shall notify the bonds-

man who may within thirty (30) days from the date of such notice file with the Court a motion to set aside the order and judgment. If the bondsman fails to file said motion within the thirty (30) days, the forfeiture shall become a final judgment and the Clerk shall immediately issue execution thereon.

Section 33 of the act provides that all liability of the bondsman may be enforced on motion without necessity of an independent action if conformance with the foregoing is shown. Appellants assert that these designated provisions of the act contravene not only the provisions of the Constitution of the State of Oklahoma but also of the Federal Constitution. The State and Federal Constitutional questions were raised and urged in the proceedings in bond cases filed by them in the Supreme Court of Oklahoma.

Before the adoption of this act the procedure in Oklahoma on forfeiture of bail bonds given to guarantee the appearance of defendants and to collect money from the sureties thereon consisted of the Trial Court in an order declaring the appearance bond forfeited. Thereafter the State's attorney in a separate action filed a civil suit against the principal and sureties on the bond to collect money in the face amount thereof on which a summons or notice was served upon the defendants giving them an opportunity to defend before a trial by jury, unless waived, to subpoena witnesses, cross examine state's witnesses and the right to appeal to the Supreme Court of the State from any judgment that may be rendered against

them. The act of 1965, if valid, takes away the right of jury trial and the right of notice prior to the time of entry of a money judgment against the sureties. These rights are fundamental guaranteed by both the State and the Federal Constitutions and cannot be removed by an act of the State Legislature.

Cases sustaining the jurisdiction of this Court are: *Zucht vs. King*, 260 U.S. 174, 43 S.Ct. 24; 67 L.Ed. 194; *Application of Gault*, 87 S.Ct. 1428 (1967); *Hoyt v. Florida*, 368 U.S. 57 (1961); *Ferguson v. Georgia*, 365 U.S. 570 (1961).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED:

This appeal involves Article 2, Section 19 of the Oklahoma Constitution and Title 12, O.S.A. 556 pertaining to the right of trial by jury in civil cases for the recovery of money, also, the Seventh Amendment to the Constitution of the United States pertaining to the right of jury trial at suits of common law where the value of the controversy exceeds $20.00.

Article 2, Section 7 of the Oklahoma Constitution pertaining to due process and Amendment 14 to the United States Constitution pertaining to due process and equal protection of the laws.

The provisions of the United States Constitution which prohibit the legislative branch of our government from enact-

ing legislation concerning powers conferred upon the judicial branch of government. These provisions reapper in Appendix A attached.

QUESTIONS PRESENTED:

Do the provisions of the 1965 Bail Bond Act of the Oklahoma Legislature, Sections 30, 32 and 33 thereof violate the provisions of the United States Constitution?

Did the Supreme Court of Oklahoma err in refusing to issue a writ of prohibition prohibiting the respondents in the lower Court from the enforcement and execution of said statute?

Did the Supreme Court of Oklahoma err in quashing the temporary stay order which it had entered staying the execution and enforcement of the statute during the time of the pendency of the actions in the Supreme Court and a final determination thereof by said Court?

STATEMENT:

Prior to January 15, 1969 the District Court of the Seventh Judicial District of Oklahoma County, Oklahoma and numerous judges thereof together with judges of other courts in said county which later became merged with and made a part of the District Court of Oklahoma County, Oklahoma,

under the reorganization of the court system of the State of Oklahoma which became effective on January 13th, 1969, had entered judgments forfeiting criminal appearance bonds posted by various defendants for their appearance before the Court on which bonds the appellants herein were sureties. In Appendix B appears a detailed description of the twenty-one cases later referred to and identified in the two original proceedings filed in the Supreme Court of the State of Oklahoma, cases numbers 43,342 and 43,437. This description contains the style, the amount of the appearance bond, and the name of the judge. The appendix contains a copy of the bond, a copy of the order of forfeiture, notice from the Court Clerk of the forfeiture and notice from Joe B. Hunt, the Insurance Commissioner of the State of Oklahoma of the bond forfeiture. The notices and order were the same in each case with the exceptions of case number, name of the defendant, the amount of the bond and the name of the judge. In all of these cases the bondsman had received in time the ten (10) day notice by publishing the criminal docket requiring the defendant to appear as provided by the act and had received the notices of the forfeiture sent by the Court Clerk and by the Insurance Commissioner to them. No motion was filed in either of these cases by the sureties to vacate the judgment of forfeiture and money judgment which had previously been rendered against them by the Court.

The Trial Court was in the process of enforcing the execution on these judgments as provided by the 1965 act which prompted the appellants herein to file an original proceeding in the Supreme Court of the State of Oklahoma in January, 1969 to enjoin the District Court of the Seventh Judicial District and A. P. Van Meter, Judge thereof from the enforcement and execution of the judgment theretofore rendered by Judge Van Meter. This cause was docketed under number 43,342. The Supreme Court of Oklahoma assumed original jurisdiction; and pending a determination of the issues on the questions raised in this case, certain other judges of the Seventh Judicial District that had rendered judgments of forfeiture and money judgments against the sureties on criminal appearance bonds which they had entered in twenty other cases were proceeding to enforce and execute upon said judgments pursuant to the act in question the judgments being in the total sum of $40,250.00. This prompted the filing by the petitioners in the Supreme Court, cause number 43,437, to enjoin the enforcement and execution of the judgments rendered pursuant to this act until the Court had determined the constitutional questions raised in cause number 43,342. A temporary restraining order was issued against the further enforcement and execution upon said judgments pending a final determination by the Oklahoma Supreme Court. The Court rendered its judgment in these two causes which had been consolidated for disposition, the judgment appears in Appendix B. Under the Oklahoma pro-

cedure it is not required that the Supreme Court make or file separate findings of fact and conclusions of law upon the issues determined by it.*

The Oklahoma Supreme Court in its opinion disposing of the two cases before it, held the legislative act not to be in violation of the State Constitution of Oklahoma and refused to issue a writ of prohibition against the enforcement or execution of the act by the respondents in the State Court and vacated the stay of the enforcement of the statute which the Supreme Court had ordered during the pendency of the cases in the Supreme Court and until the final determination thereof.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL:

A. The act violates not only the Oklahoma constitutional provisions dealing with the right of jury trial, but also the Seventh Amendment to the United States Constitution which also guarantees such right. The Oklahoma Supreme Court in its opinion by Mr. Justice Jackson stated the right to trial by jury declared inviolate by Article 2, Section 19 of the Constitution of Oklahoma except as modified by the Constitution has reference to the right as it existed in the territory at the

*A companion case is now pending in the United States District Court for the Western District of Oklahoma, Civil No. 69-305, styled Resolute Insurance Company vs. The District Court of the Seventh Judicial District of Oklahoma involving the same issues. A three-Judge Court has been empanelled to try the issues. If an appeal is taken from this Court to the Supreme Court of the United States, there will no doubt be findings of fact and conclusions of law separate and apart from the judgment entered which will be of aid to the appellate court in reviewing such issues.

time of the adoption of the Constitution and was predicated upon the right as guaranteed under the United States Constitution and according to the common law.

The Court held in effect that a jury trial was not provided for to recover on forfeited bail bonds and did not exist in the territories prior to the adoption of the Oklahoma State Constitution and, consequently, the rules of common law would prevail in determining such rights in Oklahoma. It pointed out that a common law a surety on a forfeited bail bond in a criminal case was not entitled to a jury trial, citing two New York cases as authorities: *People of the State of New York vs. Michael L. Quigg*, 59 NY Rep. 83 (1874); and *Guildersleeve and Roberts vs. the People*, 10 Barb. 35 (1850). These cases hold that actions upon recognizances were special statutory proceedings summary in character and unknown to the common law and, therefore, not within the provisions of the Federal Constitution relating to jury trials. The colony of New York had made no provision for jury trials on forfeiture of recognizances. The two cited New York cases involved a statute passed by the New York legislature in 1844 which provided for summary proceedings to recover on forfeited bail bonds and applied only to the City of New York. It did not involve the remainder of the State. In Volume 6 of Carmody, Page 173-176 in discussing the constitutional guarantees of New York, it is stated:

"Beginning with the earliest constitution of the State in 1777 and continuing with state constitutions adopted in 1821, 1846, and 1894, the constitution of the State preserved a right to trial by jury in each instance where such right existed prior to the adoption of the constitution, against legislative change or denial by a trial judge. The present constitution which was adopted in 1938 provides that trial by jury in all cases in which it has heretofore been guaranteed by constitutional provision shall remain inviolate forever."

"Trial by jury in all cases in which it hath heretofore been used in the colony of New York shall be established and remain inviolate forever."

In *People vs. Lott, Sheriff* (1855) 21 Barb. 130, the Supreme Court of New York stated:

"In 1830 the revised statutes altered the law * * * and directed that whenever a recognizance to the people should be forfeited it should be prosecuted by the District Attorney in an action of debt for the penalty and that on the breach of the condition being proved or confessed or found by default judgment should be absolute for the penalty and executions should be awarded and executed in the same manner as upon judgments in personal actions and with the like effect in all respects (2 R.S. 362, Sections 26, 21)."

"Thus stood the law until 1844 when it was found necessary to establish a new police system for this city (New York City), and to save the city from the large amount of costs to which it was subjected by the prosecutions of recognizances when nothing was collected from the defendants. The all and summary proceedings were accordingly restored so far as regarded recognizances in criminal cases in this city; and it was declared that all recognizances given to answer to a charge preferred before courts of criminal jurisdiction on being forfeited should

> be filed by the District Attorney with a certified copy of the order of the Court forfeiting the same * * * and that such judgment should be alien on the real estate of the persons entering into the recognizance * * * and that an execution might issue to collect the amount * * * in the same form as upon a judgment recovered in the court of common pleas of said city and county, in an action of debt in favor of the people against the persons entering into such recognizances."

The opinion in this case further points out: "the law of 1844 was not intended in any way to curtail the force or effect of a judgment contained in a state way but to save expenses and obtain the same objects as before in a summary method." It would appear, therefore, that the Supreme Court of Oklahoma erroneously relied upon the two New York cases cited in its opinion which held that judgment on recognizances could be taken in a summary method. This provision was made by a special act for New York City and County where the law at that time governing the remainder of the State of New York provided for a separate action to be prosecuted by the District Attorney as an action of debt in the same manner as upon judgments and personal actions.

A later case from *New York, Moot vs. Moot*, 108 NE, 424 held:

> "The right of trial by jury preserved by the Constitution, Article 1, Section 2 in all cases heretofore enjoined is a right to a jury trial in such cases as it existed at the time of the adoption of the Constitution in 1846."

The almost universal rule is that the right to a jury trial guaranteed and preserved by the Constitution of a state is the right that existed at the time of the adoption of the Constitution being the right presently in force in the colony or in the territory that preceded the formation of a state. If no provisions existed in the territorial law, then we must turn to the common law for the source of the right. The Constitution does not necessarily preserve the particular statutory method of procedure in force prior to its adoption, but it does preserve and guarantee the right of a jury trial leaving to subsequent legislatures the power to adopt procedure carrying it into force. *Mary Moynihan* (Mo) 62 SW, 2d, 410, 91 ALR 74; *Metropolitan Casualty Company vs. Mrs. B. W. Huhn*, 142 SE 121-59 ALR 719; *Barry vs. Truax* (N. Dak) 99 NW 769; *People vs. Harding* (Mich.) 18 NW 555; *State ex rel District Judge* 88 NW 742 (Minn.); *State ex rel Mullin vs. Doherty* 47 P. 958 (Wash.); *Purchasing Co. vs. Boston et al* 70 P. 1114 (Mont.); *Wheeler vs. Caldwell* 75 P. 1031 (Kan.) In this case the Kansas Court pointed out that the right to a jury trial shall remain as ample and complete as it was at the time the Constitution of Kansas was adopted; and in determining what common law rule was in effect in Kansas at the time of the adoption of its constitution, it was held to be the common law in England and the statutes and acts of the Parliament prior to the fourth year of James I of a general nature not local to that kingdom, and not repugnant to or inconsistent with the Constitution of the

United States, plus the act adopted to organize the territories of Nebraska and Kansas, plus any statute law which was from time to time adopted or passed by the legislative assembly of the Territory of Kansas, all of which became the common law of Kansas and remained such until the adoption of the State Constitution of Kansas. This case inferentially holds that the territorial legislative acts have priority among the provisions of the common law in determining the constitutional right to be given in jury trials.

The Supreme Court of Oklahoma inadvertently overlooked the laws of Oklahoma territory existing prior to statehood or the laws of Indian Territory in existance prior to the time the State of Oklahoma was created out of these two territories. There existed in each of these two territories at the time of the adoption of the Oklahoma State Constitution, laws guaranteeing the right of a trial by jury in proceedings to recover against sureties on criminal bail bonds. This right having existed was brought forward and merged into the Oklahoma Constitution. The Oklahoma territorial legislature in 1890 and again in 1893 and again in 1903 enacted a statute (Appendix A) providing that after the bond is forfeited, the District Attorney must proceed by action against the bail upon the instrument. This law was in effect in the territory for seventeen (17) years prior to the adoption of the Oklahoma Constitution in 1907. The statute in using the word "action" did not state whether or not an action for a trial by jury was intended but in any event it af-

forded the defendants a right to defend the action either before the Court or before a jury and to deny both would be a denial of due process. The Supreme Court of Oklahoma has held that the type of action referred to is one that entitles the defendants to jury trial. *State vs. Metcalf*, 50 Okla. 1, 159 P. 470; *Longdon et al vs. State* and *King et al vs. State* 114 Okla. 213, 245 P. 599; *Nix et al vs. State* Okla. 380 P.2d 709. *Bilby vs. Stewart et al* 55 Okla. 767, 153 P. 1173. It is held in the Bilby case:

> "The right of trial by jury guaranteed by Section 19, Article 2 except as modified by the Constitution itself, means the right as it existed in the territory of Oklahoma at the time of the adoption of the Constitution."

For the same holding see State ex rel *Charles West vs. T. S. Cobb*, 24 Okla. 662, 104 P. 361. Also see *Keeter vs State ex rel Saye* 82, Okla. 89, 198 P. 866, 17 ALR 557.

With respect to the Indian Territory portion of what is now Oklahoma the governing law prior to statehood was Mansfield's Digest of the laws of Arkansas made applicable to the territory by congressional act together with the Constitution of the United States and the common law. There were no territorial statutes existing in the Indian Territory prior to statehood. Nevertheless, the Federal Courts had sustained the provisions of Mansfield's Digest and the laws of Arkansas in procedures for enforcement of forfeited bail bonds.

The Arkansas statute at the time provided (Appendix A.) that upon forfeiture of the bond the Clerk shall issue a summons against the bail requiring them to appear to show cause why

judgment should not be rendered against them for the amount of the bail bond on account of the forfeiture thereof which summons shall be executed as in civil actions and the actions proceed as an ordinary civil action.

This statute and procedure outlined therein was recognized and affirmed in *Zufall et al vs. United States* (Court of Appeals of Indian Territory, January 14, 1898) 43 SW 760. The Court stated in this case:

> "It is quite clear the summons mentioned in Section 2068 is not intended to be the writ of scire facias because scire facias besides being a writ also was a pleading."

In *Southern Surety vs. State* 34 Okla. 781, 127 P. 409 (1909) affirmed 241 U.S. 582, 60 L.Ed. 1187, 36 S.C. 692, it is held that the proper procedure to recover money on forfeited appearance bond posted in the Indian Territory prior to Oklahoma statehood for the defendant's appearance where the defendant thereafter failed to appear before the Court after statehood upon an indictment which had been returned against him, was by suit brought in a separate action by the County Attorney against the sureties. Since the law in both territories out of which Oklahoma was carved provided for separate actions by jury trial against sureties on bail bond forfeitures, this basic right was guaranteed and carried over into the Oklahoma Constitution and it was not necessary to rely upon the common law rule which the Oklahoma Court referred to in disposing of this constitutional question in the opinion which is

rendered. It is held in *Bradford vs. Territory* 1, Okla. 366, 26 P. 1001:

> "A territory sustained a relation to the United States different from a state; and the Constitution of the United States, in its provisions for trial by jury in suits at common law is in force in the territories."

It is pointed out in this case that the rule pertaining to right of jury trial embraces all suits which are not of equity and admiralty jurisdiction. Territories are creatures of congressional act and derive their powers, executive, legislative, and judicial, from the Constitution of the United States and are controlled by any limitations and restrictions therein. Under this authority the territory had the right to create the statute providing for a separate action to be filed on bail bond forfeitures. The sureties were guaranteed the right to defend the action. The provisions were not repugnant to nor inconsistent with the United States Constitution and did not violate any limitations or restrictions therein. This provision was an enlargement to some degree upon the provision of the Federal Constitution with reference to guaranteed due process and trial by jury.

In view of the constitutional guarantees preserved by both the State and the Federal government the Oklahoma legislature was without authority to enact the bail bond law of 1965 involved in this appeal.

B. The act in question denies petitioners due process of law in failure to give notice prior to the entry of a money judgment against them that such judgment would be taken.

At the time of the forfeiture of the bonds in which the petitioner and in which the plaintiffs herein were sureties, they were not parties to the 21 criminal actions heretofore listed. Plaintiffs do not deny that the court had the right to order the forfeiture when the defendants failed to appear. Plaintiffs assert, however, that before a money judgment could be rendered against them as sureties an action would have to be filed, a summons or notice given before judgment in order that they may have an opportunity to demand trial by jury or a trial before the court. The legislative act in question does not make provisions for this type of proceeding and cannot be sustained as against a constitutional attack.

Cornman vs. Conway 151 So 620 (La)

> "Where statute is unconstitutional because of failure to provide for judicial proceedings for confiscation of property or for previous notice to owner giving of notice to owner or owners actual notice of seizure, does not authorize enforcement of statute."

Additional cases holding statutes void for failure to provide for notice before judgment are the *American Surety Company vs. Baldwin and Baldwin vs. American Surety Company* 53 SC 98; 287 US 156; 77 L.Ed. 231. In this case the trial court entered a judgment summarily without notice to surety bondsmen for the amount of the bond. This was held to be denial of due process under the Federal Constitution, but since the Federal Constitutional question had not been raised nor preserved in the proceedings in the state court of Idaho it could not be raised for the first time in the federal courts and the

appeal was denied. See also *Missouri vs. North* 271 US 40; 70 L.Ed. 818 46 SC 384. *Dartmouth College vs. Woodward* 4 L.Ed. 629. *Windsor vs. McVeigh* 93 US 277 23 L.Ed. 915. *Hovey vs. Elliott* 167 US 409; 42 L.Ed. 215; 17 SC 841. *Truax vs. Corrigan* 257 US 312, 332; 66 L.Ed. 254, 263; 27 ALR 375. *Hurtado vs. California* 110 US 516, 535; 28 L.Ed. 232; 4 SC 111.

Appellant, Maryland National Insurance Company, a Georgia corporation, had been duly licensed and qualified under the laws of Oklahoma to do business in the State of Oklahoma in writing bonds since prior to 1960. They had done business in Oklahoma for many years prior to the adoption of the 1965 Bail Bond Act and this company was automatically authorized to write bonds because of its qualifications under prior laws. It became an insurer under the act and the appellant, Carl Brooks, became licensed as a surety bail bondsman under said act. Section 30 of the act provides if there is a breach of the undertaking the Court shall declare the undertaking and any money that has been deposited for the bail forfeited and the proceeds paid into the Clerk of the Court and in the case of a surety bondsman the Court shall immediately direct a copy of the order and judgment of forfeiture to the Commissioner (State Insurance Commissioner) who shall give notice by mailing a copy of the order and judgment of forfeiture to the surety bondsman and his insurer directing them to make a deposit to the Commissioner of cash or other valuable security in the face amount of said forfeiture. Should said deposit not be made to

the Commissioner within thirty days the Commissioner shall in case of a surety bondsman immediately cancel the license privilege and the authorization of the insurer to do business within the State of Oklahoma and cancel the license of all of said insurers, surety bondsman, agents, or runners who are licensed by the act. In case of professional bondsman withdraw the face amount of the forfeiture from the original deposit and placing it in a separate escrow account pending appeal and final judgment upon said forfeiture. The Commissioner shall then immediately direct the said professional bondsman to make additional deposits to bring the original deposit to the required level and on failure of the bondsman to make such additional deposit within ten (10) days his license shall be revoked and all sums held by the Commissioner retained. These provisions of the act offend the due process clause of the Constitution of the State of Oklahoma and of the Federal government. It permits the Commissioner to take into his possession money belonging to the sureties and retain it and hold it before the judgment of forfeiture becomes final thereby depriving the appellants use of their money during said interim which if the case is appealed through the Supreme Court of Oklahoma may entail a time in excess of two (2) years. This procedure cannot be constitutionally sustained under the following authorities:

Christine Sniadach vs. Family Finance Corporation of Bay View (Wis), 37 (Wis) 2d 163; 154 NW 2d 259, 393 US 1078. Herein the Wisconsin statute provided that the garnishee shall

pay over to the defendant a subsistence allowance out of the wages then owing in a definite sum which allowance shall be applied to the first wages earned in the period subject to the garnishment action. Mr. Justice Douglas in the opinion deliver by him in reviewing the judgment of the Supreme Court of Wisconsin on petition for a writ of certiorari pointed out that the petitioner was served with summons the same day as the garnishee and thus the petitioner did not have an opportunity to be heard before the in rem seizure of the wages. The petitioner's wages were frozen before a hearing and would not be unfrozen until the trial of the main action has been held on its merits. In the interim the wage earner is deprived of his enjoyment of earned wages without any opportunity to be heard or tender any defense. The petitioner was a resident of Wisconsin and in personam jurisdiction was readily obtainable. The question in this case is whether there has been a taking of property without that procedural due process required by the Fourteenth Amendment. Justice Douglas referred to the cases of *Shroeder vs. New York* 371 US 208, 212 and *Mullane vs. Central Hanover Trust Co.* 339, US 306, 314 on the question of what constitutes the right to be heard within the meaning of procedural due process. It is stated in the Mullane case that the right to be heard "has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." Applied to this case the question is whether the interim freezing of the wages without a chance to be heard violates procedural due

process. The result is that a pre-judgment garnishment of the Wisconsin type may as a practical manner drive a wage earning family to the wall where the taking of ones property is so obvious it needs no extended argument to conclude that absent notice and prior hearing this pre-judgment garnishment procedure violates the fundamental principals of due process. Citing *Coe vs. Armour Fertilizer Works* 237 US 413, 423. The Oklahoma Bail Bond Act in Section 30 only provides that the bail bondsman or the insurer shall have written notice of the date of the trial or hearing of the defendant in the criminal case at least ten (10) days before his required appearance. This notice merely informs the sureties what date the defendant himself is ordered to appear for trial. Nothing is contained in this notice that the State is going to take a monetary judgment against the sureties upon bail bond. Under this act if the defendant fails to appear for trial, the Court enters an order forfeiting the bond. No complaint is made if this were the only order entered by the Court. However, in addition thereto, the Court forthwith enters a monetary judgment against the sureties on the bond at a time when said sureties have never been sued and are not parties to the criminal action wherein the State of Oklahoma is plaintiff and the person charged with a crime is the sole defendant. To render judgment against the sureties under such conditions and requiring them to forthwith deposit the amount of the judgment with the Commissioner to be held and retained by him during all of the time which may be thereafter consumed in filing motions in an attempt to vacate such

judgments and thereafter appeal adverse judgments to the Supreme Court impounding the money of the sureties excluding them from the use of the same is a violation of the due process clause of the Federal Constitution. The state act is, therefore, unconstitutional in this regard.

C. The act is void in that it violates the provisions of the Federal Constitution against the encroachment of legislative powers conferred upon the judicial branch of the government. Section 32 of the act, among other things provides:

> "In the event of forfeiture of a bail bond the Clerk of the Trial Court shall notify the bondsman on the bond who may within thirty (30) days of the date of such notice file with the Court a motion to set aside the order of forfeiture * * * If the bondsman fails to file said motion within thirty (30) days the forfeiture shall become a final judgment * * * Where the motion to set aside is filed within thirty (30) days as provided above the Court shall set the motion on a day certain for hearing and within thirty (30) days of filing of said motion * * * ."

By this language the Oklahoma legislature is attempting to legislate a judgment or make a judgment become automatic after the expiration of a certain time or upon the happening of a certain event which renders the act void.

In the Ohio case of *Schario vs. State* 138 NE 63, 64, the legislative act in question provided:

> "and the case shall be held by such reviewing court within not more than thirty (30) court days after filing such petition in error."

The court held:

> "Syllabus 4. An act of general assembly attempted to preemptorily prescribe the time within which any court in the exercise of its judicial functions shall hear or determine a matter properly within its jurisdiction is a legislative invasion of judicial power and as such is unreasonable and unconstitutional and therefore null and void."

The Indiana Supreme Court in the case of *State ex rel Kostas vs. Johnson* 69 NE 2d 592 held:

> "Syllabus 4. Any act which by the legislature attempts to hamper judicial functions or interfere with discharge of judicial duties is unconstitutional.
>
> Syllabus 5. A statute forbidding a court to hold any issue to advisement more than sixty (60) days and depriving court of jurisdiction in the cause for failure to determine any issue within ninety (90) days after taking it under advisement is unconstitutional as constituting legislative interference with judicial functions."

Waits vs. Burgess 245 P. 2d 944. In this case the Nevada Court held:

> "Syllabus 1. Legislative undertaking to require judicial action within fixed periods of time is an unconstitutional legislative interference with judicial functions."

AT & SF Railway Company vs. Long 122 OK 86 251 P. 486. In this case the Oklahoma Supreme Court held unconstitutional a section of an initiated measure adopted by a vote of the people which provides:

> "that the district courts shall try certain classes of cases within ten (10) days after the defendant has answered and that appeals must be taken within ten (10)

> days from the rendition of the judgment except for the good cause shown the trial court may extend this time for a period not to exceed twenty (20) days."

on the ground that it is an attempt by the legislative branch of the government to usurp the powers conferred upon the judicial branch thereof and to limit or abolish the judicial discretion belonging to the court necessary for the proper administration of justice.

In *Booge vs. District Court of Lincoln County* 365 P.2d 589, the Court of Criminal Appeals of Oklahoma, the Court of final resort on criminal matters in the State of Oklahoma, announced the rule as to the proper separation of powers as between the judicial and the legislative branches of government. This case involved the construction of a statute making it mandatory upon the courts to grant a continuance in cases wherein an attorney in the case was a member of the State legislature as long as it was in session and for thirty (30) days thereafter, Title 12 O.S.A., Section 667. The Court held that the act making a continuance mandatory and denying the Court of discretion in granting such continuance was an unlawful invasion of judicial functions by the legislature and declared the act unconstitutional. Citing the case of *McConnell vs. State* 227 Ark. 988, 302 SW 2d 805.

In the McConnell case it is stated:

> "The general assembly cannot assume the exclusive power in determining whether continuance should be granted in a judicial proceeding * * * . The questions is whether the general assembly can consistently with the

separation of governmental powers take from the courts the power to decide what is essentially a judicial question."

In the case of *Burt vs. Williams* 24 Ark. 91, the Supreme Court of Arkansas held invalid a statute requiring that all cases pending be continued until the ratification of peace between the United States and the Confederate States as being an unconstitutional attempt by the Arkansas legislature to exercise judicial power. Herein it is held that the granting of a continuance is an exercise of judicial discretion or an application of legal rules to them, the facts ascertained by the Court and the discretion used or application of law made by the Court and in either case it is exclusively a judicial act.

In the case of *Ringlander vs. Star Co.* 90 NY Supp. 772, the Supreme Court of New York speaks out on the matter of encrochment of legislative acts upon the judiciary department of government. The statute in question provided that if under the rules certain cases were entitled to a preference to be tried, then the Judge or Court must designate a day during that term on which said cause *shall* then be heard. Under the law before this statute was passed the Courts were allowed discretion in the matter of setting cases for trail and could see that no injustice was done in giving the preference provided for. By the change in the statute the legislature removed the Court's right to exercise any discretion because it commands the Court to set the case down for trial on a day certain and to try the case on that day. In holding that this act is an unlawful encroachment

of the legislature upon the judicial branch of the government the Court pointed out that it is blatantly a violation of due process stating:

> "One of the powers which has always been recognized as inherent in courts, which are protected in their existence, their powers, and jurisdiction by constitutional provisions, has been the right to control its order of business, and to so conduct the same that the rights of all suitors before them may be safe-guarded. This power has been recognized as judicial in its nature and as being a necessary appendage to a court organized to enforce rights and redress wrongs. That a mere ministerial duty cannot be imposed upon a court has long been recognized as inconsistent with its judicial functions, for the exercise of which alone under our system of government are courts organized; the ministerial and executive and legislative functions being lodged in other and independent branches of the government. It is claimed in the case at bar that the Legislature, in providing that the court shall put the case down for trial on a day certain in the term for which it is moved, and try the case on that day, is compelling the court to perform a ministerial act, depriving it of all discretion as to the day of trial. * * * But there are further judicial functions which have always heretofore been exercised by the courts in connection with the fixing of days for the trial of causes pending before them and the commencement of such trials, namely, whether it would be just to the parties to compel a trial at the time asked for. In determining this question the courts have always exercised their judicial discretion, and the want of its exercise in favor of postponement in a proper case has been held to be error upon appeal. It certainly cannot be that the Legislature can say that the court shall be justified in compelling A. to go to trial under exactly the same circumstances wherein it would be error to compel B. to go to trial. And yet this is what this act commands the court to do.

It seems to me that no one can read the amendatory law, having in mind, as he is bound to do, the previous condition of the law upon the subject, without having the conclusion forced upon him that the Legislature intended to deprive the courts of all discretion, and to compel them to try these cases at the term for which they are moved; thus depriving the courts of the right to exercise that judicial discretion which has always been their prerogative. I do not think that the Legislature can do this. The courts are not the puppets of the Legislature. They are an independent branch of the government, as necessary and powerful in their sphere as either of the other great divisions. And, while the Legislature has the power to alter and regulate the proceedings in law and equity, it can only exercise such power in that respect as it has heretofore exercised; and it has never before attempted to deprive the courts of that judicial discretion which they have been always accustomed to exercise. * * * It may, however, be stated generally that due process of law requires an orderly proceeding adapted to the nature of the case; in which the citizen has an opportunity to be heard, and to defend, enforce, and protect his rights. A hearing or an opportunity to be heard is absolutely essential. We cannot conceive of due process of law without this." * * * The court is commanded to set the cause down for a day certain, and try it on that day. Can it be said that the court would not be justified under this law in going on with the trial under such circumstances? Clearly not. It is commanded so to do; and it has never yet been held to be error to obey the plain mandate of a constitutional law. On the contrary, it would be error if it did not follow it. Can a judgment obtained under such circumstances be said to be obtained by due process of law? It seems to me clear that it cannot. * * * He is deprived of a right which is not only accorded to other suitors, but which it would be error to refuse them. This cannot be due process of law. The process of the law includes every step from summons to judgment, and if a party is deprived of any right usually accorded to others it is not due process of law."

In holding the act unconstitutional on the grounds of a denial of the due process the Court stated:

> "It is what may be done, not what has been done that determines the constitutionality of an act of the legislature."

On the question of notice in advance of the taking of a judgment, see *Louisville & Nashville Railroad Company vs. Schmidt* 177 U.S. 747. This case holds that it is error to render a judgment against one who was not served with process in the action or named as a party until after the original judgment was rendered unless such party had voluntarily appeared previously to the judgment and made a defense to the action to which he was not technically a party and by such entry he waived his right of notice before judgment and the due process clause of the Constitution was not offended.

If this act is permitted to stand, sureties on bail bonds would be stripped of all defenses except performance of the conditions of the bond have been rendered impossible by an act of God, an act of the obligee, or an act of law; as pointed out in *Pruitt vs. State ex rel Farris* 186 Okl. 205, 97 P.2d 35; *State vs. Drake* 40 Okl. 538, 139 P. 576; *United Bonding Insurance Company vs. State ex rel Patrick* (Okl.) 382 P. 2d 146. It is stated in the Pruitt case:

> "In an action on a forfeited appearance bond the sole legal defenses thereto are that the performance of conditions therein have been rendered impossible either by an act of God, an act of the obligee or an act of law. Where neither of these conditions exist no defense is permitted."

Thus a surety would be prevented from defending on a bond forfeiture action brought against him on the grounds of forgery of the bond or other irregularities that might occur during the preparation of the bond, reformation of the instrument where errors occur by mutual mistake and any other ground exclusive of the three (3) grounds pointed out in the Pruitt case.

Under the foregoing authorities an act of the Legislature which encroaches upon the functions of the judiciary and is thus void and unconstitutional and denies due process to the parties affected thereby. The Oklahoma Legislative Act does this very thing and should be stricken down by reason thereof.

CONCLUSION:

This appeal raises an issue of fundamental importance to our system of jurisprudence. The questions presented have never before been passed upon either by the Supreme Court of the State of Oklahoma or by this Court. The right to a trial by jury and to a trial after due notice in actions involving forfeiture proceedings against sureties on bail bonds was fundamental to the Oklahoma Territory and the Indian Territory preceding the adoption of the Oklahoma Constitution upon the creation of the state in 1907. The history of these rights and its adoption by the territories which later became Oklahoma clearly establishes that they are the basic rights preserved by the Oklahoma Constitution. It would be ironic indeed if Oklahoma were now permitted to nullify the carefully

preserved protections of the trial by jury and after the process of due notice before judgment to permit the 1965 Bail Bond Act of Oklahoma to nullify these safeguards. It was not necessary for the Oklahoma court to revert to the common law and to the New York decisions to find a basic rule determining the issues presented. The rule had already been created by the territories and the courts thereof prior to Oklahoma statehood on the very questions that are raised in this appeal and we submit that this Court should apply and sustain these rules that in bail bond forfeiture proceedings the sureties are entitled to a trial by jury and to due process consisting of notice served in a separate action where they may have a trial either with or without jury, cross-examine witnesses and have an opportunity to appear from the time of the summons to the judgment.

Respectfully submitted,

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